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NO. 82-6870

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

JIMMIE WAYNE JEFFERS,

Petitioner,

-vs-

THE STATE OF ARIZONA,

Respondent,

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

# RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Has the Arizona Supreme Court violated the United States Constitution by refusing to remand petitioner's case to the trial court for resentencing after it struck down one of the statutory aggravating circumstances found by the trial court?

2. Has the Arizona Supreme Court construed the phrase "especially heinous, cruel and depraved" in such a way that it gives proper guidance to the sentencing authority?

3. Did petitioner have a reasonable expectation of privacy in a note that he voluntarily gave to a detention officer?

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## STATEMENT OF THE CASE

On February 9, 1978, a jury convicted petitioner of the first-degree murder of Penelope Cheney. On July 10, 1980, the Honorable Ben C. Birdsall of the Pima County Superior Court imposed a death sentence for that crime. Petitioner's direct appeal to the Arizona Supreme Court was unsuccessful: on January 24, 1983, that court affirmed the judgment of guilt and sentence imposed. State v. Jeffers, ____Ariz.____, 661 P.2d 1105 (1983). This petition for certiorari followed.

## JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

## ARGUMENTS

### I

### SINCE THE TRIAL COURT HAD FOUND NO MITIGATING CIRCUMSTANCES, THERE WAS NO NEED TO REMAND FOR RESENTENCING AFTER THE ARIZONA SUPREME COURT STRUCK DOWN ONE OF THE AGGRAVATING CIRCUMSTANCES.

Petitioner claims that the Arizona Supreme Court erred in upholding his death sentence after it had struck down one of the statutory aggravating circumstances found by the trial court and modified the other. According to petitioner, the Arizona Supreme Court should have remanded the matter to the trial court for resentencing. Its failure to do so, petitioner alleges, amounts to a violation of the Eighth Amendment requirement that capital sentencing discretion be properly channeled by specifically articulated standards. Respondent submits that petitioner's claim is meritless.

Petitioner relies upon this Court's decision in Zant v. Stephens, ____U.S.____, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), to support his position, claiming that the Zant case discussed an issue "identical" to that presented in

the instant case. In Zant, the jury convicted the defendant of murder, found three statutory aggravating circumstances, and imposed the death penalty. On direct appeal, the Georgia Supreme Court affirmed, even though it set aside the second aggravating circumstance found by the jury. Stephens v. State, 237 Ga. 259, 227 S.E.2d 261, cert. denied, 429 U.S. 986 (1976). The Georgia Supreme Court had previously stated that where two or more aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon. However, the Georgia court had never explained the rationale for its position. Under Georgia law, the jury must find at least one statutory aggravating circumstance before it can recommend the death penalty, and the trial court must follow a recommendation of death. Even if the jury finds an aggravating circumstance and no mitigation, it may recommend a life sentence rather than death. In light of the uncertainty about the rationale for the Georgia court's position, this Court remanded the matter to the Georgia court for a statement of the premises of state law that support the conclusion that a death sentence is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury.

In petitioner's case, the trial court found two statutory aggravating circumstances: 1) that petitioner committed the murder in an especially heinous, cruel, and depraved manner; and 2) that petitioner knowingly created a grave risk of death to others in the commission of the murder. See Ariz.Rev.Stat.Ann. § 13-703(F)(3) and (6). The trial court found no mitigating circumstances. On direct appeal, the Arizona Supreme Court held that the

evidence did not support a finding of grave risk of death to others or a finding that the murder was especially cruel. However, the Arizona court agreed that the murder was especially heinous and depraved. State v. Jeffers, supra, ____Ariz. at ____, 661 P.2d at 1129-31. The Arizona Supreme Court also affirmed the trial court's findings on mitigating circumstances. 661 P.2d at 1131-33.

Petitioner argues that the Arizona Supreme Court recently remanded a case similar to his for resentencing and cited Zant v. Stephens, supra, as authority for this action. The case petitioner refers to is State v. Gillies, No. 5424 (Ariz.Sup.Ct., Apr. 19, 1983). In that case, the Arizona court struck down three of the four aggravating circumstances found by the trial court. Noting that the trial court had indicated there were mitigating circumstances present but that they were not sufficiently substantial to call for leniency, the Arizona Supreme Court stated:

> Law and policy would indicate that the trial judge should again make the determination required by A.R.S. § 13-703(E). See also Zant v. Stephens, ____U.S.____, 102 S.Ct. 1856 (1982).

Slip opinion, at 2. Petitioner asserts that this remand procedure should have been followed in his case.

Assuming for the sake of argument that the Arizona Supreme Court's decision in State v. Gillies, supra, amounts to a holding that a remand for resentencing is required where a statutory aggravating circumstance is struck down on appeal, there is still no basis for a remand in petitioner's case. Under Arizona law, a trial court must impose a sentence of death if it finds one or more aggravating circumstances and no mitigating circumstances. Ariz.Rev.Stat.Ann. § 13-703(E). Thus, in the Gillies case, although the trial court found the mitigating circumstances

to be insufficient to call for leniency when balanced against the four statutory aggravating circumstances, it is uncertain whether the trial court would have reached the same conclusion in balancing the mitigating factors against only one statutory aggravating circumstance. That same uncertainty is at the heart of this Court's decision in Zant v. Stephens, supra: whether the jury would still have recommended a death sentence based upon two rather than three aggravating factors. In petitioner's case, however, there is no uncertainty. The Arizona Supreme Court found one valid statutory aggravating circumstance and no mitigation. Under these circumstances, the trial court has to impose a sentence of death. Thus, there was no need for a remand for resentencing in petitioner's case.

II

THE ARIZONA SUPREME COURT HAS INTERPRETED THE "ESPECIALLY HEINOUS, CRUEL OR DEPRAVED" LANGUAGE OF ARIZONA'S DEATH PENALTY STATUTE IN A MANNER THAT IMPOSES MEANINGFUL LIMITS ON SENTENCING DISCRETION.

Petitioner contends that the Arizona Supreme Court has violated the Eighth and Fourteenth Amendments by holding that the statutory aggravating circumstance that the murder be committed in an especially heinous, cruel, or depraved manner must be read in the disjunctive. According to petitioner, such a construction is unconstitutionally overbroad in that it does not impose meaningful limits on sentencing discretion. Thus, petitioner concludes, the Arizona court is without a principled manner to distinguish cases in which the death penalty should be imposed from those in which it should not be.

Petitioner's reliance here is on this Court's decision in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). A jury convicted Godfrey of two counts of murder and imposed sentences of death on each. The

death sentences were based upon the jury's finding "that the offense of murder was outrageously or wantonly vile, horrible and inhuman." Under Georgia law, one of the statutory aggravating circumstances requires proof beyond a reasonable doubt that the offense "was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." This Court's concern was whether the Georgia Supreme Court had construed the language of this aggravating circumstance in such a manner as to provide clear and objective standards that would avoid the arbitrary and capricious infliction of the death sentence. A plurality of this Court noted that a person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." More importantly, the trial court did nothing to dissuade Godfrey's jury from this notion: it gave the jury no guidance concerning the meaning of any of the terms used in the statutory aggravating circumstance. Further, the Georgia Supreme Court's affirmance of Godfrey's death sentences did not limit the application of this aggravating circumstance as it had done in other cases. Therefore, this Court reversed the judgment of the Georgia Supreme Court insofar as it left standing Godfrey's death sentences.

Under Arizona law, one of the statutory aggravating circumstances requires proof that the defendant committed the offense in an especially heinous, cruel or depraved manner. Ariz.Rev.Stat.Ann. § 13-703(F)(6). The trial court found that petitioner's murder of Ms. Cheney was especially heinous, cruel and depraved. On direct appeal, the Arizona Supreme Court overturned the trial court's finding on cruelty, but upheld the finding on the

especially heinous and depraved nature of the crime. State v. Jeffers, supra, 661 P.2d at 1129-31. The Arizona court has long held that this particular aggravating circumstance must be read in the disjunctive, and thus it concluded that the trial court had correctly found an aggravating circumstance even though one portion of that finding (cruelty) had been erroneous. See, e.g., State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067 (1980).

Petitioner's complaint is that the disjunctive reading of Ariz.Rev.Stat.Ann. § 13-703(F)(6) allows arbitrary imposition of the death penalty since that aggravating circumstance would apply to any murder. Godfrey v. Georgia, supra, does not set forth a hard and fast rule that aggravating circumstances of this sort must not be read in the disjunctive or they will be found to be unconstitutional. The Godfrey decision, like its predecessors Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), holds only that language of the sort employed in § 13-703(F)(6) must be narrowly construed to give adequate guidance to the sentencing authority. The Arizona Supreme Court has issued numerous opinions construing the phrase "especially heinous, cruel or depraved." See Exhibit "A." Many of those opinions have struck down trial court findings concerning this aggravating circumstance. In addition, the Arizona court has insisted that the killing must be especially heinous, cruel or depraved. Another factor that distinguishes the Godfrey case from petitioner's is that in Arizona the trial judge, not the jury, imposes sentence. Ariz.Rev.Stat.Ann. § 13-703(B), (E). A trial judge who must determine whether a killing is "especially heinous,

cruel or depraved" can read the Arizona cases and use them for guidance. In this manner, the Arizona Supreme Court has sufficiently directed and limited the discretion of the sentencing authority, thereby complying with the requirements of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and Gregg v. Georgia, supra. Petitioner's complaint that § 13-703(F)(6) is applicable to any and all murders is contradicted by the numerous decisions listed in Exhibit "A" and by the decision in petitioner's own case.

III

PETITIONER HAD NO REASONABLE EXPECTATION OF PRIVACY IN A NOTE THAT HE VOLUNTARILY GAVE TO A JAIL DETENTION OFFICER.

Petitioner argues that the warrantless search and seizure of his written communication by a jail official violated the Fourth and Fourteenth Amendments. Petitioner wrote the note on a piece of paper while confined in the Pima County jail on several pending charges. Petitioner folded the paper and gave it to a detention officer to deliver to another jail inmate. The officer opened the note, read it, and turned it over to his superiors. The note was eventually admitted in evidence against petitioner at trial. By upholding the admission of this note, petitioner contends, the Arizona Supreme Court has violated his constitutional rights and taken a position that is inconsistent with case law from other jurisdictions.

The application of the Fourth Amendment depends upon whether the person invoking its protection can claim a justifiable, reasonable, legitimate expectation of privacy that has been invaded by the challenged governmental action. This test involves a subjective element (whether the individual himself has exhibited an expectation of privacy) and an objective element (whether the individual's

subjective expectation is one that society is prepared to recognize as reasonable). Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). This Court has recognized that a person incarcerated pending trial simply does not possess the full range of freedoms of an unincarcerated individual. Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). In Bell v. Wolfish, supra, this Court discussed the applicability of the Fourth Amendment to pretrial detainees:

> It may well be argued that a person confined in a detention facility has no reasonable expectation of privacy with respect to his room or cell and that therefore the Fourth Amendment provides no protections for such a person. In any case, given the realities of institutional confinement, any reasonable expectation of privacy that a detainee retained necessarily would be of a diminished scope.

441 U.S. at 556-57, 99 S.Ct. at 1883, 60 L.Ed.2d at 480 (citations omitted).

The Arizona Supreme Court did not hold in petitioner's case that the Fourth Amendment does not apply to pretrial detainees. It merely held that under the circumstances present in this case, petitioner's expectation of privacy was not justifiable, reasonable, or legitimate. Petitioner voluntarily gave his note to a guard for delivery to another inmate. The note was not sealed in an envelope and petitioner did not ask the guard not to read it. In light of this Court's pronouncements on the applicability of the Fourth Amendment to pretrial detainees, the Arizona Supreme Court plainly did not err in upholding the admission of the note. Petitioner's conduct in surrendering the note to a guard demonstrates that his expectation of privacy was not justifiable.

Petitioner's claim that the Arizona court's decision is inconsistent with case law from various federal circuits is

not well founded. None of the cases cited by petitioner deals with a situation similar to petitioner's. Both United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982), and United States v. Valley, 653 F.2d 403 (9th Cir. 1981), deal with seizures of papers from an inmate's cell, and in the latter case the seizure was upheld. While United States v. Savage, 482 F.2d 1371 (9th Cir. 1973), cert. denied, 415 U.S. 932 (1974), may be arguably similar to petitioner's situation, Savage's note was in a sealed envelope destined for deposit in the United States mail. Further, the Savage decision preceded that of this Court in Bell v. Wolfish, supra.

CONCLUSION

Because petitioner has failed to show a violation of any constitutional right, this Court should deny the Petition for Certiorari.

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# A F F I D A V I T

STATE OF ARIZONA )
) ss.
COUNTY OF MARICOPA )

GERALD R. GRANT, being first duly sworn upon oath, deposes and says:

That he served the attorneys for the petitioner in the foregoing case by forwarding one (1) copy of OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

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this 5th day of July, 1983.

Gerald R. Grant
GERALD R. GRANT

SUBSCRIBED AND SWORN to before me this 5th day of July, 1983.

NOTARY PUBLIC

My Commission Expires:

[illegible]

CR21-128
2304D clp

EXHIBIT "A"

CASES CONSTRUING THE PHRASE
"HEINOUS, CRUEL OR DEPRAVED"

State v. Jeffers, ____Ariz.____, ____, 661 P.2d 1105, 1130-31 (1983) (overturning trial court's finding of cruelty).

State v. Gerlaugh, ____Ariz.____, ____, 659 P.2d 642, 643-44 (1983).

State v. Zaragoza, ____Ariz.____, ____, 659 P.2d 22, 28-29, cert. denied, ____U.S.____ (1983).

State v. Gretzler, ____Ariz.____, ____, 659 P.2d 1, 9-12, cert. denied, ____U.S.____ (1983).

State v. Woratzeck, ____Ariz.____, ____, 657 P.2d 865, 870 (1982) (overturning trial court's finding of cruelty).

State v. Poland, 132 Ariz. 269, 285, 645 P.2d 784, 800 (1982) (overturning trial court's finding).

State v. Blazak, 131 Ariz. 598, 604, 643 P.2d 694, 700, cert. denied, ____U.S.____, 103 S.Ct. 189, 74 L.Ed.2d 149 (1982) (overturning trial court's finding).

State v. Ortiz, 131 Ariz. 195, 206, 210, 639 P.2d 1020, 1031, 1035, (1981), cert. denied, ____U.S.____, 102 S.Ct. 2259, 72 L.Ed.2d 863 (1982) (overturning trial court's finding of cruelty).

State v. Tison (Ray), 129 Ariz. 546, 555, 633 P.2d 355, 364 (1981), cert. denied, ____U.S.____, 102 S.Ct. 180, 74 L.Ed.2d 147 (1981).

State v. Tison (Rick), 129 Ariz. 526, 542-44, 633 P.2d 335, 351-53, cert. denied, 454 U.S. 848 (1981).

State v. Vickers, 129 Ariz. 506, 515, 633 P.2d 315, 324 (1981).

State v. Bishop, 127 Ariz. 531, 534, 622 P.2d 478, 481 (1980) (overturning trial court's finding of cruelty).

State v. Clark, 126 Ariz. 428, 436-37, 616 P.2d 888, 896-97, cert. denied, 449 U.S. 1067 (1980) (overturning trial court's finding of cruelty).

State v. Ceja, 126 Ariz. 35, 39-40, 612 P.2d 491, 495-96 (1980) (overturning trial court's finding of cruelty).

State v. Steelman, 126 Ariz. 19, 26, 612 P.2d 475, 482, cert. denied, 449 U.S. 913 (1980).

State v. Madsen, 125 Ariz. 346, 352, 609 P.2d 1046, 1052, cert. denied, 449 U.S. 873 (1980) (overturning trial court's finding).

State v. Lujan, 124 Ariz. 365, 372-73, 604 P.2d 629, 636-37 (1979) (overturning trial court's finding).

State v. Brookover, 124 Ariz. 38, 40-41, 601 P.2d 1322, 1324-25 (1979) (overturning trial court's finding).

State v. Watson, 120 Ariz. 441, 448, 586 P.2d 1253, 1260 (1978), cert. denied, 440 U.S. 924 (1979).

State v. Ceja, 115 Ariz. 413, 417, 565 P.2d 1274, 1278 (1977).

State v. Knapp, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977), cert. denied, 435 U.S. 908 (1978).

State v. Blazak, 114 Ariz. 199, 206, 560 P.2d 54, 61 (1977).